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BEFORE THE SUBCOMMITTEE ON ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS, AND EMERGENCY MANAGEMENT

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

U.S. HOUSE OF REPRESENTATIVES

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Madam Chair and Members of the Subcommittee, good afternoon. It is an honor and great privilege to appear before you today to present testimony regarding the status of the arbitration program created for Public Assistance projects for Hurricanes Katrina and Rita. My area of expertise encompasses designing systems to resolve disputes in the federal government using various forms of alternative or appropriate dispute resolution (ADR), including interest-based negotiation, mediation, arbitration, and other processes. A fellow of the National Academy of Public Administration, I have conducted empirical research on mediation in employment at the United States Postal Service, ADR use by the Assistant US Attorneys and Department of Justice, and processes for settlement at the Occupational Safety and Health Review Commission. I have also served as a consultant on ADR for the Department of the Air Force, Department of Agriculture, and National Institutes of Health. I have not served as a consultant or in any capacity with the Federal Emergency Management Agency (FEMA) prior to my invitation to present testimony today.

As requested, I intend to address lessons learned from FEMA's Public Assistance arbitration and other programs and from federal agency experience with other forms of ADR that might aid in resolving disputes arising under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

I. FEMA's Existing Dispute Systems Design for the Public Assistance Program

Pursuant to 42 U.S.C. §5189a, FEMA adopted an appeals process for the Public Assistance program (42 U.S.C. §5170, et seq.), codified in 44 C.F.R. §206.206 that permits an eligible applicant, subgrantee, or grantee to appeal FEMA's Public Assistance program determinations in writing through the grantee. Most generally, there are two levels of appeal within FEMA, a first appeal to the Regional Administrator and second level to the Assistant Administrator for the Disaster Assistance Directorate. Appellants must appeal within sixty (60) days after receiving notice of FEMA's action. FEMA must respond within ninety (90) days of receiving the appeal either by disposition of the appeal or requesting more information. Ultimately, FEMA's disposition of the second appeal is the final agency decision on matters committed to agency discretion and not subject to judicial review except on limited grounds, such as constitutional procedural due process of law claims.

In response to concerns regarding delays on disputed claims for Public Assistance related to Hurricanes Katrina and Rita, Congress enacted a limited arbitration alternative as part of section 601 of the American Recovery and Reinvestment Act of 2009, Public Law 111-5. The President delegated to the Secretary of the Department of Homeland Security authority to establish the arbitration program, who in turn designated the Civilian Board of Contract Appeals (CBCA)[1] in the General Services Administration (GSA). Under 44 C.F.R. §206.209, the arbitration program generally provides that an

[1] *See generally,* http://www.cbca.gsa.gov/, which identifies the CBCA's commitment to ADR.

applicant may submit a written request for arbitration within thirty (30) days of notice of the FEMA's disputed action. The CBCA arbitration administrator appoints a three-member panel from among its administrative law judges. FEMA must respond within thirty (30) days of receipt. Within ten (10) days after FEMA's response, this panel conducts a preliminary telephone conference with all parties, establishes a hearing schedule, and supervises exchange of information and documents. Upon a party's request and generally within sixty (60) days of the telephone conference, the panel conducts a hearing at which all participants can hear each other simultaneously either in person, by telephone, or by other means. Within sixty (60) days after the hearing closes, the panel issues a written reasoned decision that discusses its factual and legal basis. The arbitration award is binding and substantially final, subject to limited judicial review under the Federal Arbitration Act, 9 U.S.C. §10.

To date, there have been approximately twenty-six (26) arbitration cases, fewer than might have been anticipated given the backlog of disputed cases at the time the program was created. The Civilian Board of Contract Appeals has a panel of administrative law judges with substantive expertise related to disputes over public infrastructure contracts and procurement. The program provides sufficient due process to participants consistent with arbitration's goals of providing a final and prompt decision to the parties. Unlike mandatory arbitration in employment and consumer disputes, this program is voluntary for the applicants, which are institutions with access to specialized counsel and more bargaining power than an employee or consumer acting alone. Thus, it raises no concerns about fairness similar to the controversial use of adhesive arbitration plans for employees and consumers. The CBCA has been able to absorb this caseload and there appear to be no administrative issues.

However, the program has resulted in substantial awards against FEMA, raising budgetary issues for the agency. There are too few case awards to date to constitute a sufficient sample for meaningful statistical analysis.

II. FEMA and ADR

Federal agencies have broad statutory authority to develop ADR programs under the Administrative Dispute Resolution Act of 1996 (ADRA).[2] Under the ADRA, 5 U.S.C. §571(3), agencies may use any form of dispute resolution, "including but not limited to "conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombuds, or any combination thereof." This amendment to the Administrative Procedure Act[3] commits to agency discretion whether and how to use ADR, but requires that every federal agency must appoint a dispute resolution specialist and develop a policy on ADR.[4]

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[2] See Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (codified as amended in scattered sections of 5 U.S.C.).

[3] 5 U.S.C. §500*, et seq.*

[4] For a more detailed discussion of ADR in the federal government, see Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Citizen and Stakeholder Voice*, 2009 J. DISP. RESOL. 269 (2009); and Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal*

Every federal agency has adopted ADR for employment disputes,[5] and many agencies have also adopted ADR programs for procurement issues, environmental disputes, and civil enforcement.[6] The ADRA has contributed to a great expansion of ADR use within the federal government.

FEMA has adopted a mediation program for employment disputes.[7] Its ADR Office lists contact information for staff members who in theory are available to provide services for other categories of disputes. However, it does not appear that FEMA has exercised its broad existing statutory authority to develop permanent ADR programs beyond employment. At present, FEMA has no formal program providing for negotiation or mediation as ADR alternatives for Public Assistance program disputes.

However, FEMA does have experience using mediation for disputes related to disasters, and particularly, to hurricanes, as reflected in this excerpt from the *Interagency ADR Working Group Report to the President* (May 2000) and the *Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government* (April 2007):[8]

> **Federal Emergency Management Agency**
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> After Hurricane Georges wreaked havoc on the Island of Puerto Rico in September 1998, a local community had disputes regarding a debris removal contract, including disagreements as to which company actually performed the work, the total amount of debris, and the amounts of money owed to the companies. This difficult situation was further complicated by an FBI criminal investigation, the incarceration of the community mayor, litigation filed against the community by a subcontractor, allegations of fraud and conspiracy by all parties, death threats, and bankruptcy petitions. Without a consensual resolution, expensive and time-consuming litigation involving all parties to the seven relevant contracts was virtually inevitable.
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> FEMA suggested mediation. The Governor, the local community, and the three contractors agreed. The mediation was very difficult, but the mediators were able to craft an acceptable agreement. The principal contractor later wrote a letter to FEMA saying the following: "I write this letter to praise certain individuals who have gone above and beyond the call of duty in representing FEMA and the people of the United States.... Through [FEMA's] initiative and good judgment,

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Infrastructure for Collaborative Governance, 10 WISC. L. REV. 297 (2010).

[5] *See generally*, Lisa B. Bingham & Charles Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate Its Success?*, 6 J. PUB. ADMIN. RES. & THEORY 383 (1996) (reviewing the state of implementation of dispute resolution in the federal government and finding widespread adoption of mediation programs in employment, some in procurement, and a few in regulatory disputes).

[6] *See generally,* Federal Interagency ADR Working Group, www.adr.gov.

[7] *See generally,* FEMA's Alternative Dispute Resolution (ADR) Policy, http://www.fema.gov/help/adr/about.shtm, and http://www.fema.gov/help/adr/faq.shtm.

[8] *Available at* http://www.adr.gov/president_reports.html.

> mediation was arranged.... Had [FEMA] not pursued the matter with uncommon vigor, it would probably be wrapped up in court for many years."

In other words, there is both legal authority and past practice supporting a broader use of mediation within FEMA.

The DHS Office of the Inspector General (OIG)'s *Assessment of FEMA's Public Assistance Program Policies and Procedures* adopts the following recommendation:

> **Recommendation #3:** Establish a FEMA-wide mediation or arbitration process for appeals that have reached an impasse. Refer claims that have reached an impasse within FEMA's appeals system to the mediation or arbitration board.[9]

However, FEMA responded: "FEMA does not concur with the recommendation, which we believe is based on a fundamentally and logically flawed supposition, as it appears to state that impasses can occur once the appeal process has been triggered by an applicant. The appeals process does not present any opportunities for an impasse to occur. Once an issue is referred for appeal, the process will produce a determination."[10]

The OIG has responded that FEMA misunderstands its use of the term impasse, which it used "to denote a significant delay in the appeals process."[11] OIG discusses negotiations with subgrantees on eligibility (p. 9), and suggested that when there are significant delays in parties coming to agreement on work eligibility, and where FEMA has not finalized project worksheets or obligated funding, this might be a good situation in which to apply mediation or arbitration. Others have recommended expanding the current arbitration program beyond disasters related to Hurricanes Katrina and Rita.

III. Recommendations for Dispute Systems Design and FEMA

FEMA has existing legal authority under the ADRA to develop a comprehensive system for addressing disputes in the Public Assistance program and other programs. A number of the recommendations before the Subcommittee involve legislatively imposing a program on FEMA without giving it the opportunity to develop a comprehensive system on its own. There is a third way; Congress could provide FEMA with the resources and direction to develop a comprehensive dispute system design for its various streams of conflict within a certain time period and then review its progress.

As discussed in more detail below, I have four recommendations:

1) FEMA should develop a comprehensive dispute systems design (DSD).

2) FEMA should involve stakeholders in the design of its comprehensive system.

3) FEMA should develop interest-based negotiation skills training for its employees in the Public Assistance and other programs.

4) FEMA should develop an evaluation system to measure and assess its performance.

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[9] OIG 10-26, 8 (December 2009).

[10] *Id.* at 32, Appendix B.

[11] *Id.* at 37, OIG Analysis of Management Comments to the Draft Report.

1) With resources from Congress, FEMA should develop a comprehensive dispute systems design.

Best practices in DSD recommend designing a system that focuses primarily on interest-based processes such as negotiation and mediation, but also includes loop-backs or interventions that bring the parties back to negotiation with additional information (such as FEMA's use of technical experts). In the event of impasse, a comprehensive DSD would include low cost rights-based processes such as fact-finding and arbitration.[12]

In DSD, it is not a question of a choice between mediation or arbitration; it may be possible or desirable to use both. Mediation and arbitration are entirely different processes. Mediation is a voluntary process in which an impartial third party assists disputants in negotiating a mutually agreed solution to the dispute. Arbitration is an adjudicatory process, and as it has been used to date in Public Assistance cases, involves imposing a binding outcome on the parties. Both have their uses in a comprehensive system.

A comprehensive system may entail a sequence, including negotiation, mediation, and potentially arbitration, perhaps overseen by an ombuds or broadened ADR Office within FEMA. The system may provide different processes or steps for different kinds of disputes. For example, the Public Assistance program DSD might provide for negotiation, followed by mediation upon request. In lieu of binding arbitration, FEMA might consider a final fact finding step for Public Assistance program disputes. In fact finding, a neutral third party hears evidence on facts that are disputed and makes findings of fact in a decision that may be either advisory or binding, depending upon the design of the program. For example, many of the disputes in the Public Assistance program concern facts such as the amount and cost of damage to public infrastructure. A fact finder's decision can provide a loopback to negotiation over how to apply the law to these facts. This would differ from the current arbitration program in that the fact finder would not have jurisdiction to render a binding award of funds under the program; that decision would remain with FEMA.

These are just a few of the many possibilities for DSD for one program. A comprehensive DSD would provide options for multiple programs.

2) FEMA should involve stakeholders in designing a comprehensive system.

Experience in other agencies suggests that ADR programs function best when they are designed in a participatory way, with extensive stakeholder engagement and input to identify the sources of conflict, culture of the agency, opportunities for training,

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[12] William Ury, Jeanne Brett, and Stephen Goldberg, GETTING DISPUTES RESOLVED (1989); Cathy Costantino and Christina Sickles Merchant, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING HEALTHY AND PRODUCTIVE ORGANIZATIONS (1996); Stephanie Smith and Janet K. Martinez, *An Analytic Framework for Dispute Systems Design,* 14 HARV. NEGOT. L. REV. 123 (2009); and Lisa Blomgren Bingham, Janet K. Martinez, and Stephanie Smith, DISPUTE SYSTEMS DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT (2011 forthcoming, Stanford University Press).

organizational structure, and opportunities for a variety of interventions using different processes. This process would address the following five key elements: What are the goals that motivate the system? What is the system's structure, including its process options and incentives for use? Who are the stakeholders of the system, and does the system reflect their interests? How is the system supported by financial and personnel resources? How successful, accountable and transparent is the system?[13]

A design process would begin by identifying the various stakeholders and their interests. The Public Assistance program is analogous to an insurance program. Stakeholders include applicants, subgrantees, grantees, FEMA employees and program officers. Stakeholders also include members of the public. FEMA could use its Open Government Plan to consult with the public through appropriate engagement processes.

FEMA's Management Responses suggest that the agency has concerns, or interests, about administering this program within the scope of its statutory authority. This is related to agency autonomy and recognition of its statutory authority. It cannot approve expenses that fall outside the scope of reimbursable costs under the Stafford Act; to do so would expose administrators to criticism by the OIG's office for *ultra vires* activity, and potentially accusations of collusion or corruption.

For example, the classic administrative law case *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947) shows an agency with the same problem. An agency representative advises a farmer that crops will be covered, but as it turns out, the regulations do not cover this planting. The agency representative cannot simply agree to depart from the regulations; this opens the door to ad hoc and inconsistent decisions outside the scope of agency authority from Congress.

Nevertheless, the OIG analysis identifies a number of opportunities for negotiation within the Public Assistance program. These involve disputed issues of fact, not the scope of coverage under the law. Disputed issues of fact include estimates of costs for repair and/or replacement. Applicants, grantees, and subgrantees have substantial interests in the expedited repair or replacement of critically important public infrastructure. One pending proposal suggested in other testimony would address this interest through the use of block grants, with negotiated totals and no recourse for supplemental funds after the fact. A systematic analysis of stakeholders' respective interests can contribute to developing a DSD suited both to the agency's mission and culture, and adapted to the needs of agency stakeholders and partners.

3) A comprehensive design should include interest-based negotiation skills training.

The OIG report also notes at least one problem with negotiation, in which FEMA project officers "inappropriately asked for concessions on some items of work in exchange for approvals of other items" (p. 10). OIG notes that, "FEMA is required to determine eligibility based on established federal criteria, not through negotiation or deal-making."

This suggests that a DSD would include negotiation training for FEMA employees involved in the Public Assistance program. Negotiation training would include the appropriate scope of negotiation permissible under the Stafford Act,

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[13] Stephanie Smith and Janet K. Martinez, *An Analytic Framework for Dispute Systems Design,* 14 HARV. NEGOT. L. REV. 123 (2009).

specifically, negotiation and mediation over facts and the application of eligibility criteria to those facts, not the terms of the statute and regulations or law itself.

It would also include interest-based or principled negotiation skills that are consistent with the collaborative relationships established between FEMA and state and local government and qualified nonprofits under these programs.[14] Previous federal studies, including the National Performance Review, which became the National Partnership on Reinventing Government, recommended interest-based negotiation skills training. Most people associate adversarial or positional bargaining with haggling over price and splitting the difference. In interest-based negotiation, parties identify and discuss interests based on needs such as security, economic well being, belonging, recognition and autonomy.[15] In the public sector, interest-based negotiation is more consistent with public officials' ethic obligations of good faith and fair dealing with the public.

4) A comprehensive system should include an evaluation component to measure its performance.

FEMA could learn from other agencies' experience with developing and measuring the impact of broader systems for managing conflict. Evaluations typically collect data on stakeholder and customer perceptions of the system or experiences in mediation or arbitration. In addition, evaluations examine how the program affects dispute processing, for example the time frame within which disputes are resolved or the number or proportion of disputes appealed to the rights-based processes.

Studies have suggested that early intervention upstream with interest-based processes can reduce the number of adjudications downstream. For example, some believe that ADR has contributed to a 20-year decline in the trial rate from 12 to 2 percent of all cases filed in state and federal courts.[16] A study of ADR use by Assistant US Attorneys found that the earlier ADR was used in the life of a case, the sooner the case terminated or reached final disposition.[17] Similarly, in the United States Postal Service, implementation of a mediation program correlated with a 30 percent drop in formal adjudicated complaints of discrimination.[18] Performance data can help improve the system.

Conclusion: It is a privilege and honor to testify before the Subcommittee. I am happy to answer questions and provide additional information.

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[14] *See generally,* Lisa Blomgren Bingham and Rosemary O'Leary (eds.), BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT (2008).

[15] Roger Fisher, William Ury, and Bruce Patton, GETTING TO YES (1991).

[16] Lisa Blomgren Bingham, Tina Nabatchi, Jeffrey Senger, and M. Scott Jackman. *Dispute Resolution and The Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. ON DISP. RESOL. 225 (2009).

[17] *Id.*

[18] Lisa Blomgren Bingham, Cynthia J. Hallberlin, Denise A. Walker, and Won Tae Chung, *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*. 14 HARV. NEGOT. L. REV. 1-50 (2009).